UPREME COURT, U. S.

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 601

JOHN KERIAKOS, Acting Sheriff and Master of House of Correction at Billerica, Massachusetts,

PETITIONER,

v.

JOSEPH L. HUNT,

RESPONDENT.

JOSEPH V. McBRINE, Commissioner of Penal Institutions for the City of Boston,

PETITIONER,

v.

JOSEPH N. PALLADINO, SR.,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Attorney General.
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JOSEPH N. PALLADINO, SR.,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Opinions Below

The consolidated opinion of the court below (App. A) is not yet reported. With respect to respondent Hunt, the

opinion of the district court (App. B) is not reported. With respect to respondent Palladino, the opinion of the district court (App. C) is reported at 310 F. Supp. 308.

Jurisdiction

The judgment of the court below was entered on June 19, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Whether the court below erred in concluding that, as a matter of law, "no photograph of the female anatomy, no matter how posed if no sexual activity is being engaged in, or however lacking in social value, can be held obscene."

2. Whether the court below erred in concluding that the issue of obscenity *vel non* can be retried in a proceeding brought under the provisions of the Federal Habeas Corpus Act (28 U.S.C. 2241 *et seq.*).

Statement

After jury-waived trials, both respondents were convicted in the Suffolk County Superior Court of selling, and possessing with intent to sell, various obscene magazines in violation of Mass. Gen. Laws, ch. 272, § 28A.[1] Respondent Hunt, who was convicted on four counts, was sentenced to the House of Correction for three months, and was fined a total of $400. Respondent Palladino, who was convicted on three counts, was sentenced to the House of Correction for three months, and was fined a total of

[1] Each respondent was first convicted on the charges in a local district court. Under Massachusetts procedure, a convicted defendant is entitled to a *de novo* trial on appeal to the Superior Court.

$300. On consolidated appeal, the Massachusetts Supreme Judicial Court, as against their claim, *inter alia*, that the magazines were not obscene as a matter of law, affirmed the convictions in a rescript opinion. *Commonwealth* v. *Johnson*, 1969 Mass. Adv. Sh. 824 (1969). On December 16, 1969, this Court—again against a claim, *inter alia*, that the magazines were not obscene as a matter of law—denied a consolidated petition for a writ of certiorari *sub nom. Johnson* v. *Massachusetts*, 396 U.S. 990. On or about January 8, 1970, respondent Palladino filed a petition for rehearing with this Court, and on or about January 12, 1970, he filed an application for suspension of order denying certiorari with this Court. The application for suspension of the order denying certiorari was denied by this Court on January 16, 1970, *sub nom. Johnson* v. *Massachusetts*, 38 U.S.L.W. 3276, 3277. On February 24, 1970, this Court denied the petition for rehearing *sub nom. Johnson* v. *Commonwealth*, 38 U.S.L.W. 3321.

While the petition for rehearing was pending in this Court, each respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts. After a hearing, each petition was dismissed as against the renewed claim that the magazines were not obscene as a matter of law. *Hunt* v. *Fitzpatrick*, Misc. Civil No. 70-8-C (D. Mass. February 26, 1970) (not reported) (App. B); *Palladino* v. *McBride*, 310 F. Supp. 308 (D. Mass. 1970) (App. C). Each respondent noted an appeal, and the two cases were consolidated for argument in the court below. On June 19, 1970, the court below ruled that—as a matter of law—the magazines were not obscene, and ordered that respondents be discharged from custody (App. A).[2]

1. The evidence originally introduced in the trial court

[2] On appeal, John Keriakos was substituted as appellee in Hunt's case.

consisted primarily of the magazines and other evidence and testimony showing sale and or possession of those magazines. We therefore set forth below the nature of those magazines, together with that evidence showing sale and or possession by respondents.

A. A magazine entitled "Cover Girl", Vol. #8, published by Nordisk Bladcentral A S, P.O. Box 288, Copenhagen V, Denmark, copyright 1967. The cover page of this magazine contains a color photograph of a woman dressed in a negligee which drapes her shoulders, a garter belt, and stockings. She is standing upright with breasts and perineal area in full view. The remainder of the magazine contains similar photographs, most of which are focused upon the breasts or perineal area. An eleven-photograph sequence shows the same girl photographed on the cover page disrobing from a dress to garter belt, stockings, and shoes, and posing in a series of contortionistic poses designed to emphasize the perineal area and vulva. The publisher states that this magazine is intended for artists having difficulty finding live models.

This magazine is the subject matter of Complaint No. 35273 against respondent Palladino. The evidence showed that on April 2, 1968, this magazine was purchased from the 200 Book Club in Boston (Tr. 93-97).[3] The person who made the sale was Joseph Palladino, Jr. (Tr. 95). The 200 Book Club is owned by respondent Palladino (Tr. 106). The magazine was sealed in a cellophane wrapper, and sold for an advertised price of $5.00 (Tr. 94-95). Other evidence showed that signs stating "No persons under 21 admitted" and "Adults Only" were affixed to the outside of the 200 Book Club owned by petitioner (Tr. 10-11).

B. A magazine entitled "Cover Girl", Volume #9, published by Nordisk Bladcentral A S, P.O. Box 288, Co-

[3] References ("Tr.") are to the transcript of trial.

penhagen V, Denmark, copyright 1967. The cover page shows a woman dressed in a negligee which hangs over her shoulders, gloves, garter belt, and stockings. She is standing upright, with both breasts and genital area in plain view of the camera. The remainder of the magazine contains similar photographs, with the camera focused either on the breasts, perineal area and or vulva and anus. Many of the photographs show women in contortionistic poses obviously designed to emphasize the perineal area and vulva. An eleven-photograph sequence shows a model disrobing from dress to garter belt and stockings. The last photograph of that sequence shows the model with a bathrobe draped over her shoulders with breasts fully exposed. Her legs are spread apart at an approximate angle of 45 degrees in order to emphasize the perineal area which is facing the camera. The publisher states that the magazine is intended for serious minded artists having difficulty finding live models.

This magazine, the subject matter of Complaint No. 34833 against respondent Hunt, was purchased at the Cozey Book Store in Boston (Tr. 28-30). The magazine was wrapped in a sealed cellophane wrapper and placed on a rack. The entire cover page photograph was fully visible to any person who looked at the magazines on the rack (Tr. 30).

C. A magazine entitled "Wonder Girl", Volume #1, distributed by Central Sales Limited, Box 42, Baltimore, Maryland. The cover page displays a photograph of a model dressed in stockings seated upon a motorcycle. The left breast and perineal area are fully exposed. The cover page states thereon "Adults Only". Except for the articles hereinafter discussed, the remainder of the magazine devotes itself to photographs similar to that on the cover page, with principal emphasis being placed upon the breasts, perineal area, and vulva. The magazine also con-

tains four articles. The first, entitled "The World of Color", essentially points out that color photography is particularly appropriate for nude photography, and runs for one page. The second, entitled "Tips to Amateurs", is just that—giving short tips on nude photography—and runs for one and three-quarters pages. The third article, "Maids and Modesty", discusses the alleged decline of modesty and modern acceptance of nudity as part of the American culture. This article runs for one and three-quarters pages. The last article, "Artistic Values and Composition", discusses the problem of photo-composition, and urges all photographers to use imaginative studio backdrops so as to give an artistic approach to nude photography. All articles are fairly interspersed with photographs similar to that on the front cover. The magazine also contains several pages of advertisement, and is published by Sunshine Enterprises, Box 66, Mays Landing, New Jersey, as, in the publisher's words "an educational sociological publication equating the contemporary nude in color to artistic expression in a classic tradition."

This magazine was the subject matter of Complaint No. 3403, against respondent Palladino. The evidence showed that on March 16, 1965, a police officer purchased the magazine from respondent Palladino (Tr. 51-54). The magazine was sealed in a cellophane wrapper, and sold for an advertised price of $5.00 (Tr. 53, 54). A label or tag covered the genital area of the model on the cover (Tr. 58). A sign on the outside of the book-store prohibited minors from entering (Tr. 56-57).

D. A magazine entitled, "Exciting" Volume No. 15, published by Nordisk Bladcentral A/S, P.O. Box 288, Copenhagen V, Denmark. The cover page of that magazine contains a color photograph of a model dressed in a negligee which is draped over her left shoulder, garter belt, stockings, and shoes. Her breasts and perineal area are fully

exposed. Indeed, the pubic area appears to have been shaved, and the vulva, which is framed by the garter belt and stockings, is given primary emphasis. The remaining photographs in the magazine are of the same import. By way of contortionistic poses and photograph framing, the perineal area, vulva and in some cases, anus, are emphasized to the viewer. A ten-photograph sequence shows the model on the cover page disrobing from skirt and blouse to stockings, garter belt, and blouse draped over her shoulders. The magazine contains two other sequential photographs of the same nature. In its statement, the publisher states that "the magazine will be sold only to adults who are serious-minded of problems of art and will look on our pictures solely from an aesthetical point of view."

This magazine is the subject matter of Complaint No. 3439 against respondent Palladino. The evidence showed that on February 7, 1968, a Boston police officer purchased the magazine at the 200 Book Club in Boston (Tr. 9-15). The magazine had been placed on a bookrack, was sealed in a red cellophane wrapping, and sold for an advertised price of $5.00 (Tr. 11-12). Other evidence showed that signs stating "No persons under 21 admitted" and "Adults Only" were affixed outside of the store (Tr. 10,11); and that the store was owned by respondent Palladino (Tr. 17).

E. A magazine entitled "Suzette", published by Sunshine Enterprises, Box 66, Mays Landing, New Jersey. The front cover shows a photograph of a model clothed in stockings and a garter belt. Breasts and genital area are fully exposed with emphasis being placed upon the genital area. "Adults Only" is written on the front cover. The remainder of the photographs in the magazine are of essentially the same order, with primary emphasis being placed upon the perineal area. Many of the photographs, most of which are in color, fully expose and focus upon the vulva. The magazine contains four articles. The first, entitled

"Nudity and the Fourth Estate", reports on the alleged acceptance of nudity in the American community, and criticizes a Life Magazine article which is somewhat critical of the nudity fad. This article runs three pages long. The second article, "The Prudes v. The Nudes", documents the history of "prudism", and concludes that the opposition to nudity today does not differ from the opposition of yesteryear. This article is two pages in length. The third, "The Whitman Samplor", contains an except from Whitman's "Leaves of Grass", and takes up one page. The last article, "Psychology of the Nude", attempts to discuss just that—that is, the author attempts to persuade the reader that nudity alleviates the alleged ambivalence created by clothing, and that mankind would be better served if all went about nude. All articles are fairly interspersed with photographs similar to that described on the cover page. The publisher touts the magazine as "a journal seeking to equate the nude to the art of contemporary living. Its goals will be achieved by way of free communication and an exemplary photoartistry establishing the wholesomeness, beauty, and charm of the unadorned figure."

This magazine is the subject matter of Complaint Nos. 34590, 34591, and 34832 against the respondent Hunt. With respect to Complaints Nos. 34590 and 34591, the evidence showed that on February 28, 1968, a police officer purchased the magazine from Hunt at the Cozey Book Store in Boston (Tr. 35-41).

With respect to Complaint No. 34832, the evidence showed that on March 9, 1968, a police officer purchased the magazine from Hunt, again at the Cozey Book Store in Boston (Tr. 28-30). At this time, the magazine was sealed in a cellophane wrapper, and there was no label or tag covering the genital area of the model photographed on the cover page (Tr. 30).

2. In the district court, substantially the same evidence

was introduced as was in the state trial court. In addition, a copy of the magazine "Exclusive"—which was found not obscene as a matter of law by this Court in *Central Magazine Sales, Ltd.* v. *United States*, 389 U.S. 50—was introduced into evidence in the district court's hearing on respondent Palladino's petition. In each case, the district court judge—applying the three-pronged test set forth by a plurality of this Court in *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418—found the magazines obscene in the constitutional sense.

3. Three days prior to oral argument in the court below, this Court decided the case, *Bloss* v. *Dykema*, 39 U.S.L.W. 3473, 3477-3478 (June 1, 1970). In that case, this Court reversed, *per curiam*, the decision in *Dykema* v. *Bloss*, 17 Mich. App. 318, 169 N.W.2d 367, in reliance upon *Redrup* v. *New York*, 386 U.S. 767. The Chief Justice and Mr. Justice White were of the opinion that the petition for a writ of certiorari should have been denied. Mr. Justice Harlan, dissenting, was of the opinion that the judgment should have been affirmed. Mr. Justice Marshall took no part in the consideration of the case. The magazines involved in that case included, *inter alia*, different volumes of "Cover Girl" and "Exciting"—both of which are here in issue. With the assent of all parties, various copies of the magazines involved in *Dykema* were lodged with the court below for comparative purposes.

The court below found that the magazines involved in the present case were utterly without redeeming social value. Nevertheless, the court below ruled—on the basis of *Central Magazines Sales, Ltd.* and *Dykema*—that it was "*obliged* to conclude that no photograph of the female anatomy, no matter how posed if no sexual activity is being engaged in, or however lacking in social value, can be held obscene." (footnote omitted) (emphasis added) (App. A. 19).

Reasons for Granting the Writ

I. Travelling full cycle, this case returns to this Court for a second time on the issue of obscenity *vel non* of various magazines. Since last before this Court, nothing has changed. The magazines remain the same, and this Court has not indicated departure from, or modification of, the three-pronged test set forth by a plurality of this Court in *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418, in concluding that "no photograph of the female anatomy, no matter how posed if no sexual activity is being engaged in, or however lacking in social value, can be held as obscene," the court below clearly departed from the *ad hoc* approach set forth in *Memoirs*. Moreover, the court below clearly departed from the approach taken by the various other circuits. Corrective action by this Court is therefore appropriate.

Since *Roth* v. *United States*, 257 U.S. 476, this Court has struggled with the concept of obscenity and its relationship to the rule of law. No single approach has enjoyed full acceptance by a majority of this Court. Nevertheless, in *Memoirs*, a plurality of this Court—in an effort to maintain a proper balance between the fundamental rights guaranteed by the First Amendment and the rights asserted by society at large—adopted the "material could properly be considered obscene and dealt with accordingly, if (*Memoirs*, at 418):

> (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

It is clear that, under this prevailing test, the concept of obscenity *vel non is* not a fixed one. In large part, it fully depends upon prevailing community standards which are by no means static. Thus, the test admits of an interpretation that contemporary books and magazines are not to be judged by Victorian standards. By the same token, if the past serves as a relevant guide, the governing community standards of tomorrow will not be the same as those of today. Whether tomorrow's governing community standards will be more restricted, or more liberal, is not for us to say, but must be finally judged in retrospect by the historians. But importantly, the *Memoirs* test *does* take into account the possibility and probability of change in prevailing community standards, and thus maintains the proper balance required by the First Amendment.

The court below, however, has placed a straitjacket around this underlying philosophy of the *Memoirs* test. The test of the court below ignores the second element of the *Memoirs* test—i.e., prevailing community standards—and is mechanically unyielding to changes in those prevailing community standards. In short, the United States Court of Appeals for the First Circuit has completely abandoned the *Memoirs* test, and appropriate corrective action should be taken by this Court.

2. In any event, even if this Court should be of the opinion that the subject magazines are not obscene as a matter of law—a matter which we do not concede and which we have fully briefed in our earlier response before this Court (Brief for Respondent in Opposition, *Charles Johnson et al* v. *Commonwealth of Massachusetts*, No. 458, O.T. 1969 pp. 14-21)—it is our view that the court below erred in concluding that a federal district court has jurisdiction, under the provisions of the Federal Habeas Corpus Act (28 U.S.C. 2241 et seq.), to order a state prisoner

discharged from custody on the grounds that certain magazines are not obscene.

Under settled principles, the federal habeas corpus remedy does not serve the function of an appeal to correct mere errors of law, but simply to correct errors reaching jurisdictional or constitutional dimension. *Sunal* v. *Large*, 332 U.S. 174; cf. *Hill* v. *United States*, 368 U.S. 424. As noted by this Court in *Sunal* (332 U.S. at 179):

> It is plain, however, that the writ is not designed for collateral review of errors of law committed by the trial court—*the existence of any evidence to support the conviction*, irregularities in the grand jury procedure, departure from a statutory grant of time in which to prepare for trial, and other errors in trial procedure which do not cross the jurisdictional line (Footnotes omitted) (Emphasis added).

Conforming to this view of the scope of the federal habeas corpus remedy, it has consistently been held that the remedy is not available to one who challenges the sufficiency of the evidence supporting his conviction, unless he alleges and shows that there is *no* supporting evidence. E.g., *Harlan* v. *McGrath*, 218 U.S. 442[4]; *Fulford* v. *Dutton*, 380 F. 2d 16, 17 (C.A. 5); *Martinez* v. *Patterson*, 371 F. 2d 815 (C.A. 10); *Fernandez* v. *Klinger*, 346 F. 2d 210, 211 (C.A. 9); *Hall* v. *Crouse*, 339 F. 2d 317 (C.A. 10), *certiorari denied*, 381 U.S. 941; *Faust* v. *State of North Carolina*, 307 F. 2d 869 (C.A. 4).

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[4] In *Harlan*, the Court apparently went even further and held that the habeas corpus remedy was not available even if there was *no* evidence supporting the finding of an ultimate fact. At that time, however, the remedy was limited to jurisdictional errors. In light of future developments expanding the remedy to "constitutional" errors—e.g., *Waley* v. *Johnston*, 316 U.S. 101, 104-105—the validity of the *Harlan* holding is, at best, problematical. Cf. *Thompson* v. *Louisville*, 362 U.S. 199.

Applying this principle to the present case, it is our view that the federal habeas corpus remedy should not be made available to one who challenges the state court finding that the present material is obscene in the constitutional sense. It is often stated, of course, that the issue of obscenity *vel non* is a question of law—indeed, a question of constitutional law. Cf. *Jacobellis* v. *Ohio*, 378 U.S. 184, 187-190. To the extent that characterization means that the three elements of obscenity—i.e., the dominant theme appeals to a prurient interest in sex, the material affronts contemporary community standards relating to the representation of sexual matters, and the material is utterly without redeeming social value (*Memoirs* v. *Massachusetts*, 383 U.S. 413, 418)—must coalesce, we voice no disagreement. That is true with respect to all crimes, not just crimes of obscenity. It simply means that the elements must be proved in order to establish the commission of a crime. But whether the underlying elements have been proved, we suggest, presents a different matter. Federal courts, as well as other courts, do not sit to express abstract theories of law. The legal term, "obscenity", is meaningless until applied to a particular factual context. So too, the elements of the crime of obscenity are meaningless until applied to a particular factual context.[5] Thus, whether a particular magazine meets the elements of obscenity is, in our view, a purely factual matter. The trier-of-fact must, to the best of his ability, determine whether the "facts"—i.e., the nature of the magazine—meet the legal definition of the elements of obscenity. That judgment involves the various intangibles which, in their sum and substance, add up to the decision-making process. Although the ultimate conclusion sought may properly be characterized as one of mixed

[5] As noted by Mr. Justice Stewart in this regard (*Jacobellis* v. *Ohio*, 378 U.S. 184, 197 [concurring opinion]): "But I know it [hard-core pornography] when I see it, and the motion picture involved in this case is not that."

law and fact, that characterization does not mean that the two cannot be separated. They can and should be. To say that the question is simply one of law, and to treat it as such, opens the door to further imponderables. It would lead a federal district court judge into a quest for the "ultimate truth." "Ultimate truth," however, is particularly elusive in an obscenity context. It depends, in part, upon the prevailing community standards which are by no means static. It depends, to a large extent, upon the trier-of-fact's assessment of the various elements of obscenity, and their significance and application to a particular set of facts. Indeed, "ultimate truth" is rarely, if ever, attained in an obscenity context. The motion picture film, "I Am Curious (Yellow)", is particularly illustrative. Many have tried, but few have apparently succeeded, to attain the "ultimate truth" as to the obscenity *vel non* of that film. Compare *United States* v. *A Motion Picture Film Entitled "I Am Curious—Yellow"*, 404 F.2d 196 (2d Cir. 1968), with *Howard Wagonheim, Agent et al* v. *Maryland State Board of Censors*, No. 212 (Court of Appeals of Maryland, October 22, 1969), probable jurisdiction noted *sub nom. Grove Press, Inc. et al* v. *Maryland State Board of Censors*, No. 905 O.T. 1969.

In short, a collateral attack challenging the finding of obscenity by the state court necessarily involves an endless quest similar to that seeking last night's moonbeam. To be sure, one does not relish the thought that another must be deprived of his liberty because he sold magazines which *might* not, in truth and fact, be obscene. Nor, however, does one savor the thought that the convicted murderer must be deprived of his liberty—or, indeed, his life—on the basis of mistaken evidence. Nevertheless, the scope of the judicial function—and particularly that function in a habeas corpus context—is necessarily limited by the inherent nature of the judicial process itself. That process is, in the final analysis, a truth-finding process—nothing

more, nothing less. Its success can rise no higher than the frailties of man himself. Reasonable men often disagree in their conclusions as to the significance of particular facts for reasons not susceptible to empirical analysis. Rules governing evidence and procedure, and defined principles of law, narrow the area of disagreement, but cannot eliminate it. Value judgments differ from person to person, judge to judge, and court to court. Extended and protracted litigation as to the significance of particular facts does not finally resolve the issue, but simply aids further value judgments to a matter previously resolved.[6] It is thus our view that, in keeping with the well-established principle that the federal habeas corpus remedy is not available to one who challenges the sufficiency of the evidence, the court below erred in concluding that the issue of obscenity *vel non* can be retried in a proceeding brought under the provisions of the Federal Habeas Corpus Act (28 U.S.C. 2241 et seq.).

Conclusion

For the reasons stated above, it is respectfully submitted that the questions presented for review are substantial, and that the petition for a writ of certiorari should be granted.

Respectfully submitted.

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GARRETT H. BYRNE,
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[6] The undesirability of retrying old facts has been soundly recorded by Congress. Thus, under the provisions of 28 U.S.C. 2254 (d), findings of fact made by the state courts are to be treated as presumptively correct unless not fairly supported by the record.

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 7557.

JOHN L. HUNT,

PETITIONER, APPELLANT,

v.

JOHN KERIAKOS, Acting Sheriff and Master of House of Correction at Billerica, Massachusetts,

RESPONDENT, APPELLEE.

No. 7567.

JOSEPH N. PALLADINO, SR.,

PETITIONER, APPELLANT,

v.

JOSEPH V. McBRINE, Commisisoner of Penal Institutions for the City of Boston,

RESPONDENT, APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*, McENTEE and COFFIN, *Circuit Judges*.

Mitchell Benjoya with whom *Crane, Inker & Oteri, Joseph S. Oteri*, and *Kevin M. Keating* were on brief, for appellant in No. 7557.

Joseph A. Pino, with whom *Herald Price Fahringer* was on brief for appellant in No. 7567.

Lawrence P. Cohen, Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Division, and *Garrett H. Byrne*, District Attorney, Suffolk County, were on brief, for appellees.

June 19, 1970.

ALDRICH, *Chief Judge*. These are two petitions for habeas corpus. Petitioners were convicted in the Massachusetts Superior Court of possession of obscene material with intent to sell, in violation of Mass. G.L. c. 272 § 28(A). The convictions were affirmed *sub nom. Commonwealth* v. *Johnson*, 1969 Mass. A.S. 824, without opinion. Certiorari was denied *sub nom. Johnson* v. *Massachusetts*, (1969) 396 U.S. 990, following which petitioners commenced service of their sentences. Their present petitions were denied by the district court, in each instance with an opinion. *Hunt* v. *Fitzpatrick* (2/26/70) (not reported); *Palladino* v. *McBrine*, D.Mass., 1970, 310 F.Supp. 308. Certificates of probable cause for appeal were granted and we ordered petitioners admitted to bail.

The material offered for sale comprised, in the one case, "magazines" entitled "Wonder Girl," "Cover Girl" No. 8, and "Exciting" No. 15, and in the other, magazines entitled "Suzette," and "Cover Girl" No. 9. Some of these contain a small amount of written material of no particular consequence, or, we might think, interest, with the balance pictures. The others are solely pictorial. In all instances the pictures consist of photographs, many in full color, of young women either largely or totally undressed, exposing various portions of their bodies, but generally focussing on the vulva. In some instances stockings, garter belts, or other apparel are used to increase this emphasis, and in many instances positions, even to the point of contortion, are assumed so that no detail will be lost. There is no shading, blurring, or other photographic artistry to lessen the impact, and the usual "props," in addition to scanty wearing apparel, consist of pillows, divans, etc. All photographs are what are known as "singles," (showing only one person) and no activity is involved, although it could be said that some of the positions were inviting.

In the district court one of the petitioners introduced in evidence an allegedly similar magazine entitled "Exclusive," and called the court's attention to the fact that this magazine had been decreed not obscene as matter of law by the Supreme Court in *Central Magazines Sales, Ltd.* v. *United States*, 1967, 389 U.S. 50, *reversing without opinion United States* v. *392 Copies of Magazine Entitled "Exclusive"*, 4 Cir., 1967, 373 F.2d 633.[1] In all candor, once the point of full exposure of the perineal area has been reached, there is little basis to choose between one illustration and another. There is nothing exclusive about "Exclusive." Petitioners' magazines may be more striking in their impact, but it would be very difficult for us to say that if the one is not obscene, the others are. Indeed, to do so would render the question of obscenity *vel non* even more amorphous than any test previously suggested.

We are not, however, faced with even that doubtful question. In the recent case of *Bloss* v. *Dykema*, —— U.S. ——, (6 1 70), the Supreme Court summarily reversed, per curiam, the decision in *Dykema* v. *Bloss*, 1969, 17 Mich. App. 318, 169 N.W.2d 367, in reliance upon *Redrup* v. *New York*, 1967, 386 U.S. 767. Mr. Justice Harlan, who had concurred in *Central Magazines Sales*, dissented. Whatever may be said for his often expressed view that the states are entitled to have a more rigid standard of obscenity than that decreed for the federal government, it has not been adopted by the Court. See also *Walker* v. *Ohio*, —— U.S. ——, (6 15 70).

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[1] Admittedly, this exhibit had not been presented to the Massachusetts courts, counsel telling us that he had been unable at that time to obtain a copy. We do not consider this sufficient new matter to mean that petitioners did not exhaust their state remedies within the principle of *Needel* v. *Scafati*, 1 Cir., 1969, 412 F.2d 761, *cert. denied* 396 U.S. 861. The content of "Exclusive" was fully described in the Fourth Circuit opinion, 373 F.2d at 636. Nor is *Needel* an obstacle to our taking note of *Bloss* v. *Dykema*, post. In the light of *Central Magazine Sales*, *Bloss* makes no significant change in the law.

We have been supplied with copies of the magazines involved in *Bloss*, to wit, "Pinned," "Gigi," "Missie," and various other numbers of "Cover Girl" and "Exciting." If the pictures in the case at bar could be regarded in any respect as more explicit than "Exclusive," there was no possible photographic deficiency, or restraint on the part of the models, in those accepted in *Bloss*. We do not believe the Court's action was based upon the publishers' announcement that their product was "artistic," "sociologically educating," and "essentially wholesome." We find such characterizations peculiarly inaccurate. Rather, we are obliged to conclude that no photograph of the female anatomy, no matter how posed if no sexual activity is being engaged in, or however lacking in social value, can be held obscene.[2]

The present cases do not involve pandering, *Ginzburg* v. *United States*, 1966, 383 U.S. 463; sale to minors, Mass. G.L. c. 272 § 28, *Ginsburg* v. *New York*, 1968, 390 U.S. 629, or even of offensive intrusions upon unwilling viewers, *cf. Karalexis* v. *Byrne*, D.Mass., 1969, 306 F.Supp. 1363, *prob. juris. noted*, 397 U.S. 985. Restricted as a defendant's right to federal review of state convictions may be, we have no hesitation in finding it where there is a deprivation of personal liberty contrary to constitutional standards in a situation producing fundamental unfairness. *Fay* v. *Noia*, 1963, 372 U.S. 391, 399-415, *Gregory* v. *Chicago*, 1969, 394 U.S. 111. Were we not so to hold, the result

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[2] We cannot take the fact that the Supreme Court denied certiorari in petitioners' cases as a holding to the contrary, or as res judicata. It is true that, in the light of the Court's recent practice of reversing summarily, particularly where First Amendment rights are involved, the denial of certiorari in such cases may be thought of some significance. However, to regard the failure to take action as conclusive, even in such cases, would be to impose upon the Court a burden of review it has never openly assumed. With the ever increasing number of petitions, we will not attribute to the Court a ruling on the merits unless it specifically makes one.

would be a practical recognition of varying state standards of obscenity which, as we have noted, has been rejected as a rule of law.

The judgments of the District Court are vacated, and the actions remanded with instructions to issue the writs discharging the petitioners.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Mis. Civil No. 70-8-G

JOHN L. HUNT,
PETITIONER,
v.
HOWARD W. FITZPATRICK,
RESPONDENT.

OPINION

February 26, 1970

GARRITY, J. Petitioner for habeas corpus is serving a sentence of three months, which began on January 16, 1970, as a result of his convictions for possession with intent to sell and sale of two obscene magazines, in violation of Mass. G.L. c. 272, § 28A. Petitioner was convicted in the Boston Municipal Court on March 8, 1968. On appeal to the Suffolk Superior Court petitioner was convicted on April 25, 1968 after a trial without jury by a superior court judge. On appeal to the Supreme Judicial Court, consolidated with similar cases against six other defendants, the convictions were affirmed *per curiam* on April 30, 1969. *Commonwealth* v. *Johnson*, Mass. Adv. Sh. (1969) 824. A petition for writ of certiorari to the Supreme Court of the United States was denied summarily on December 15, 1969, *sub nom. Johnson* v. *Massachusetts*, No. 458, 38 L.W. 3219 (12/16/69).

The petition in this court alleges four grounds for relief: (1) that the magazines in controversy are not obscene as a matter of law; (2) that the Commonwealth of Massachusetts failed to affirmatively establish that the magazines were obscene under the applicable tests set forth by the

Supreme Court of the United States; (3) that G.L. c. 272, § 28A, under which the complaints were framed, was unconstitutionally applied to him; and (4) that G.L. c. 272, § 28A, is unconstitutional in that it constitutes a prior restraint in violation of the Constitution of the United States. Respondent filed both a return and motion to dismiss. The court held a hearing, received the subject magazines in evidence and briefs were filed by both parties before and after the hearing.

Ground 4 was waived by petitioner because never argued before the Supreme Judicial Court of Massachusetts. Neither was ground 3, which submits that a person's right, under *Stanley* v. *Georgia*, 1969, 394 U.S. 557, to satisfy his particular intellectual and emotional needs by viewing obscene materials in the privacy of his own home would be meaningless if the state were empowered to prevent an adult from obtaining such materials. Petitioner seeks to avoid the requirement of exhaustion of available state remedies prescribed by 28 U.S.C. § 2254(b) because the *Stanley* case was not decided until after briefs were filed and the case argued before the Supreme Judicial Court. This fact constitutes no sufficient reason for failure to exhaust available state remedies. *Sobloski* v. *Commonwealth of Massachusetts*, 1 Cir., 1969, 412 F.2d 691, 693. Therefore the court grants respondent's motion to dismiss ground 3.

With respect to ground 1, that the two magazines are not obscene as a matter of law, the court notes initially that four other courts, three state and one federal, have already considered and passed upon this issue without finding it necessary to describe even in general terms the nature of the subject matter. This court will do little more. Suffice it to state that the magazines consist almost entirely of photographs of nude women, for the most part pathetic types evidently willing to endure any indignity for a fee,

posed so as to display their private parts prominently. In one of the magazines there are shorter filler articles obviously designed to give the product a veneer of legitimacy. However, at the hearing petitioner explicitly disclaimed any contention that the magazines are of any redeeming social value. The court finds that the dominant theme of the subject magazines taken as a whole appeals to a prurient interest in sex and that the magazines are patently offensive because they affront contemporary community standards. Therefore they are obscene according to the tests enunciated in *Roth* v. *United States*, 1957, 354 U.S. 476, and *Memoirs* v. *Massachusetts*, 1966, 383 U.S. 413.

Ground 2, that the prosecution failed to establish affirmatively at the trial that the magazines were obscene, urges that the mere introduction of the magazines into evidence in the state court is insufficient to sustain convictions and that expert testimony is required. Petitioner relies upon *United States* v. *Klaw*, 2 Cir., 1965, 350 F.2d 155, 167, and *Luros* v. *United States*, 8 Cir., 1968, 389 F.2d 200, 205. Those cases are distinguishable first because they involved writings rather than photographs, and secondly, because the convictions resulted from jury trials. In the court's opinion, expert testimony was not essential and the state court judges who tried the instant case without jury were fully qualified to determine whether the subject magazines were obscene according to the standards set by the Supreme Court of the United States. Cf. *Kahm* v. *United States*, 5 Cir., 1962, 300 F.2d 78, 84-85.

The petition is denied.

(s) W. Arthur Garrity, Jr.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Misc. Civil No. 70-7-J

JOSEPH N. PALLADINO, SR.,
PETITIONER

v.

JOSEPH V. MCBRINE, Commissioner of Penal Institutions, for the City of Boston,
RESPONDENT

OPINION
March 6, 1970

JULIAN, D.J.

Joseph N. Palladino, Sr., who is presently serving a three-month sentence imposed by the Massachusetts courts, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 seeking to overturn his convictions for selling and for having in his possession for the purpose of sale certain obscene magazines in violation of Mass. G.L. c. 272, § 28A.

Petitioner was convicted under three complaints charging three separate offenses:

Complaint No. 34330 charged him with having in his possession for the purpose of sale an obscene magazine called "Exciting," (Exh. 3).

Complaint No. 34983 charged him with selling an obscene magazine called "Wonder Girl," (Exh. 4).

Complaint No. 35273 charged him with having possession of an obscene magazine called "Cover Girl," (Exh. 2).

Petitioner pleaded not guilty to each complaint, was tried in the Suffolk Superior Court before a Superior Court Justice sitting without a jury, and was found guilty of

each of the offenses charged. The following sentences were imposed:

On complaint No. 34330, a fine of $3,000; on complaint No. 34983, a sentence of three months in the House of Correction; and on complaint No. 35273, a sentence of three months in the House of Correction to run concurrently with the sentence imposed on complaint No. 34983.

Petitioner appealed to the Supreme Judicial Court. His appeals were consolidated with several other cases of a similar nature. On May 2, 1969, the petitioner's convictions were affirmed, in a rescript opinion which reads as follows:

> "There was no error in the trial and convictions of the defendants on the complaints under G.L. c. 272, § 28A. Judgments affirmed." *Commonwealth* v. *Johnson,* Mass. Adv. Sh. (1969) 824.

A petition for a writ of certiorari was denied by the United States Supreme Court on December 15, 1969, (*sub nomine*) *Johnson* v. *Massachusetts*. No. 458, 38 U.S.L.W. 3219 (December 16, 1969).

In his amended return the respondent admits that the petitioner has completely exhausted all remedies available to him in the State courts and that there is no further State corrective process or procedure available to the petitioner within the contemplation of 28 U.S.C. § 2254.

Petitioner claims that the judgments of conviction, his commitment and his confinement are void for the following reasons:

1. The publications upon which his convictions rest are not obscene as a matter of law under the First and Fourteenth Amendments to the Constitution.
2. The complaints filed against the petitioner failed to allege that he knew the obscene nature of the publications when he sold them or had them in his possession for the purpose of sale.
3. There was no evidence offered at the trial from

which it could be determined that the publications in question met the "constitutional obscenity standards established by the United States Supreme Court for judging obscenity."

4. Mass. G.L. c. 272, § 28A violates the First Amendment to the Constitution because it fails to contain the standards established by the United States Supreme Court.

The petitioner's first claim is rejected. Upon an examination and consideration of the entire material contained in each of the three magazines in question, and upon an application of the criteria laid down by the Supreme Court in *Roth v. United States*, 354 U.S. 476 (1957), as elaborated in subsequent cases and restated in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) at page 418, this Court finds that the dominant theme of the numerous photographs in each magazine taken as a whole appeals to a prurient interest in sex; that the photographs are patently offensive because they affront contemporary community standards[1] relating to the representation of sexual matter; and that the photographs are utterly without redeeming social value.

Most of the photographs display nude young women in poses and postures that center the attention of the viewer upon the vulva and the surrounding area. The photographs obtrusively expose the female genitalia from different angles. They are designed and intended to appeal to a prurient interest in sex. They do just that. They serve and were intended to serve, no additional purpose except to produce revenue for the sellers. The magazines are not only wholly without redeeming social value but constitute a sordid and degrading exploitation of the female body. Only in a lawless jungle and not in a civilized society could the dissemination of material of this kind be placed beyond the reach of the law.

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[1] I take the term "community" to encompass the entire nation.

As to the petitioner's second claim, the record in the State court proceedings, considered as a whole, fairly supports the factual determination, implicit in the findings of guilty by the Superior Court and in the affirmance of the convictions by the Supreme Judicial Court, that the petitioner knew the obscene nature of the magazines when he sold them or had them in his possession for the purpose of sale. See Exh. A, transcript of trial in the Superior Court. The petitioner presented this and related issues in his brief before the Supreme Judicial Court. (See consolidated brief of defendants, Joseph M. Palladino, Sr., et al., Exh. 2 at hearing on January 30, 1970, at pp. 10-18.) The petitioner offered no evidence at the hearings before me tending to prove that this factual determination by the State courts was erroneous. See 28 U.S.C. § 2254(d).

As to petitioner's third claim, the Court takes the view that the magazines themselves constituted sufficient evidence of their obscene nature under the standards established by the Supreme Court.[2]

In his fourth and last claim the petitioner challenges the constitutionality of G.L., c. 272, § 28A, under which he was convicted. I hold § 28A to be constitutionally valid on the authority of *Roth* v. *United States*, 354 U.S. 476 (1957). *Roth* has not been overruled by *Stanley* v. *Georgia*, 394 U.S. 557 (1969).[3] In *Stanley* the Court takes pains to distinguish the case that was before it from *Roth* and similar cases in which the public commercial dissemination of obscene material was involved. At page 568 of its opinion in *Stanley* the Court expressly and categorically stated that "*Roth*

[2] It is noted that in his brief before the Supreme Judicial Court, *supra*, at page 18 petitioner stated:

> "The determination of whether materials are constitutionally protected is a legal question and must be made by the Court based upon an examination of the material itself."

[3] See *Karalexis* v. *Byrne*, D.C. Mass., Nov. 28, 1969, Civil Action No. 69-665-J, (dissenting opinion).

and the cases following that decision are not impaired by today's holding."

The Court finds and rules that the petitioner is not in custody in violation of the Constitution and laws of the United States. Therefore, in accordance with the provisions of 28 U.S.C. § 2254(a), the petition is dismissed.

United States District Judge